(2)

No. 00-583

Supreme Court, U.S.
FILED
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In The

Supreme Court of the United States

LAWYER WARD,

Petitioner,

v.

HERITAGE MEDIA CORPORATION,

Respondent.

On Petition For A Writ Of *Certiorari* To The United States Court Of Appeals For The Eighth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF *CERTIORARI*

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November 13, 2000

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CORPORATE DISCLOSURE STATEMENT

Respondent Heritage Media Corporation was acquired by News Corporation, Inc. on August 23, 1997, as a wholly-owned subsidiary. As of March 1, 1998, Sinclair Broadcasting Corporation purchased the assets of Heritage Media Corporation and, thereupon, dissolved Heritage Media Corporation.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Respondent, Heritage Media Corporation, an Iowa corporation that formerly conducted business as KXTR-FM, respectfully submits to the Court its brief in opposition ("Opposition") to Petitioner Lawyer Ward's petition for writ of *certiorari* to review the opinion of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The order of the United States District Court for the Western District of Missouri granting defendant (Respondent) summary judgment on the grounds that plaintiff (Petitioner) failed to sufficiently support a case of age discrimination under the Age Discrimination in Employment Act is unreported and appears in the Appendix to the petition at pages A-5 through A-14.

The opinion of the United States Court of Appeals for the Eighth Circuit affirming the district court's grant of summary judgment is unpublished and appears in the Appendix to the petition at pages A-2 through A-4.

The opinion of the United States Court of Appeals for the Eighth Circuit denying Petitioner's motion for recall of mandate in light of this Court's opinion in *Reeves v. Sanderson Plumbing Products, Inc.*, ___ U.S. ___, 120 S. Ct. 2097 (2000), is unpublished and appears in the Appendix to this Opposition at page A-2.

STATUTORY PROVISIONS

Petitioner filed suit under the Age Discrimination in Employment Act of 1967, which is codified at 29 U.S.C. § 621 *et seq.* and prohibits employers from discriminating on the basis of age in employment decisions. The following statutory provisions are particularly relevant:

- 29 U.S.C. § 623(a)(1). Prohibition of Age Discrimination.
- 29 U.S.C. § 626(c). Recordkeeping, Investigation, and Enforcement.

The pertinent text of each section is included in the Appendix to this Opposition. The text of § 623(a)(1) is set forth at page A-3, and the text of § 626(c) is set forth at page A-4.

STATEMENT OF THE CASE

This is an age discrimination lawsuit brought by Petitioner pursuant to the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 *et seq.* (the "ADEA"). Petitioner was fifty-seven years old when Respondent decided to terminate his employment.

In August 1979, Petitioner was hired as sales manager of KXTR-FM 96.5 ("KXTR"), a classical music radio station based in Kansas City, Kansas. As sales manager, Petitioner's primary responsibilities were to generate revenue by selling advertisements to be broadcast on KXTR, as well as to hire and supervise sales representatives. Petitioner reported to the station's owner, Robert Ingram, until September 1995 when Bill Failing was named part-

owner and President of KXTR, with responsibility for the station's daily operations.

On November 6, 1995, Failing demoted Petitioner from sales manager to senior account manager, thus relieving Petitioner of all management responsibility. That same day, Failing appointed Doyle Peterson as General Manager of KXTR. Petitioner thereafter reported to Peterson.

In August 1996, Ingram contracted to sell KXTR to Respondent. The sale was scheduled to close in January 1997. At the time, Respondent owned two other Kansas City radio stations: KCFX-FM 101.1 ("KCFX") and KCIY-FM 106.5 ("KCIY"). Bill Newman was President and General Manager of Respondent's Kansas City-based stations.

While the sales contract was pending in the fall of 1996, Respondent conducted a survey on the viability of classical radio in the Kansas City market. The results indicated that two other musical formats offered Respondent much better long-term economic prospects. Respondent therefore decided to change the format of KXTR by the spring of 1997. No specific new format was chosen at that time.

Respondent decided that, until the new format was selected, KXTR could be most efficiently operated by combining its sales staff with that of KCIY and requiring all sales representatives to sell advertisements for both stations. This common industry practice is known as a "combo sales effort." Respondent determined the combo method would work well in this instance because KXTR already had many of the same advertisers as KCIY, which

broadcast a "smooth jazz" format. Without the combination, sales representatives from both Respondent-owned stations would call on the same advertising clients and, in essence, compete with one another.

Prior to closing the sale of KXTR, Respondent determined that a staff of ten sales representatives would be necessary for the combo sales effort. Respondent had an existing staff of seven KCIY sales representatives. KXTR had a staff of five, including Petitioner. Thus, Respondent decided to interview the KXTR sales representatives and select three to join the combo staff.

In January 1997, Newman and two of Respondent's experienced sales managers conducted separate interviews of each KXTR sales representative. Prior to the interviews, all three interviewers read an article in the *Kansas City Star* which quoted Petitioner's comments regarding Respondent's impending purchase of KXTR. In the article, Petitioner said that he wanted to become a "part-owner" of KXTR but could not afford to do so. Petitioner further stated that he was committed to KXTR's classical musical format. The *Kansas City Star* article stated that Petitioner would "follow" the classical music format to another station if Respondent changed to a new format.

Prior to the interviews, Newman met separately with Failing and Peterson to discuss KXTR's five sales representatives. Failing said Petitioner had been demoted because Petitioner operated the station as if it were his "monopoly." Failing also said Petitioner "was a management problem, that he didn't follow the rules, he made up his own rules." Peterson told Newman that Petitioner

resented his demotion and had refused to follow new management's policies and procedures. Peterson cited two specific examples where Petitioner had violated the station's sales policies.

All three interviewers conducted interviews with Petitioner between January 9, 1997 and January 14, 1997. All three noted serious concerns with Petitioner's conduct during the interviews. Each found Petitioner to be extremely opinionated and to present a significant management problem. Two of the three interviewers noted Petitioner's lack of familiarity or desire to learn state-of-the-art computer-aided sales practices.

When the interviews of all five KXTR sales representatives were completed, the three interviewers met to discuss the strengths and weaknesses of each candidate. They agreed that Petitioner and one other employee should not be retained on the combo sales staff. Newman made the final decision not to retain Petitioner based on the observations stated in the notes each interviewer made concerning Petitioner's interviews. Newman also considered the information provided by Petitioner's supervisors at KXTR, and Petitioner's comments in the *Kansas City Star* article. Newman notified Petitioner on January 24, 1997 that he would not be retained when Respondent finalized its purchase of KXTR.

Petitioner filed suit against Respondent on February 6, 1998, claiming age discrimination under the ADEA. Respondent asserted the defense that its decision to terminate Petitioner was based on non-discriminatory motives, as described above. Petitioner claimed that Respondent's proffered reasons were pretextual and that

the real reason he was terminated was his age. After discovery, Respondent moved for, and the district court granted, summary judgment in Respondent's favor, because Petitioner had failed to present evidence sufficient to support an inference that Respondent's justifications were pretextual. *See Ward v. Heritage Media Corp.*, No. 98-0157-CV-W-3 at *7-*9 (W.D. Mo. Apr. 21, 1999), attached to the petition at pages A5-A14. The United States Court of Appeals for the Eighth Circuit affirmed that judgment. *See Ward v. Heritage Media Corp.*, No. 99-2540 (8th Cir. Apr. 14, 2000), attached to the petition at pages A2-A4.

On July 3, 2000, Petitioner filed a motion for recall of mandate with the court of appeals, asking that court to set aside its April 14, 2000 opinion, in light of this Court's subsequent decision in *Reeves v. Sanderson Plumbing Products, Inc.*, ___ U.S. ___, 120 S. Ct. 2097 (2000). The Eighth Circuit declined to grant Petitioner's motion, which was based on the same arguments Petitioner raises as grounds for this Court's grant of *certiorari*. *See Ward v. Heritage Media Corp.*, No. 99-2540 (8th Cir. July 12, 2000), attached hereto at A-1.

SUMMARY OF ARGUMENTS

Petitioner requests this Court grant *certiorari* to review the opinion of the Eighth Circuit affirming summary judgment in favor of Respondent, arguing that the court of appeals erred in applying the relevant law to Petitioner's claims in light of this Court's June 12, 2000 ruling in *Reeves v. Sanderson Plumbing Products, Inc.*, ___

U.S. ___, 120 S. Ct. 2097 (2000). Because *Reeves* did not change the law of the Eighth Circuit in any material respect, and certainly not as it applies to this case, the Court should not grant Petitioner's request for *certiorari*.

ARGUMENTS AGAINST GRANTING THE WRIT

In his petition, Petitioner asserts the Court "should take this case because it presents a conflict with a binding decision of this Court that deals with the same issues of law . . .." (Petition at 8.) However, Petitioner fails to squarely identify the conflict of which he complains. As demonstrated below, this is because the *Reeves* opinion, on which Petitioner relies, is entirely consistent with the Eighth Circuit law cited and applied by the lower courts in this case. Petitioner would face the same result under *Reeves* as he faced under Eighth Circuit precedent prior to *Reeves*.

Petitioner is certainly correct in observing that *Reeves* and this case share common issues of law. He is further correct in noting that the Court resolved in *Reeves* a conflict among the circuits as to the appropriate evidentiary standard on summary judgment in ADEA cases. Petitioner's error lies in failing to realize that the Eighth Circuit was already in line with this Court on the appropriate standard. For obvious reasons, Petitioner omits any discussion of Eighth Circuit case law prior to *Reeves*. Respondent submits this brief in order to demonstrate the absence of conflict between Eighth Circuit law, as applied in this case, and the *Reeves* decision. As the petition

states, "[c]onsistency is an essential element of our judicial system." (Petition at 10.) Consistency, however, is not in jeopardy here.

I. THE *REEVES* DECISION IS ENTIRELY CONSISTENT WITH THE PRE-EXISTING EIGHTH CIRCUIT LAW APPLIED IN THIS CASE.

In affirming the district court's grant of summary judgment in favor of Respondent on Petitioner's employment discrimination claims,[1] the Eighth Circuit cited *Kneibert v. Thomson Newspapers, Michigan, Inc.*, 129 F.3d 444, 452 (8th Cir. 1997), as support for the proposition that all of Petitioner's claims were properly dismissed because they "suffer from the same deficiency – lack of a jury issue as to pretext." *Ward v. Heritage Media Corp.*, No. 99-2540, at *2 (8th Cir. Apr. 14, 2000). In *Kneibert*, the court noted that the decision of *Rothmeier v. Investment Advisors, Inc.*, 85 F.3d 1328, 1336-37 (8th Cir. 1996), concerning the evidence necessary to withstand a summary judgment motion, had been adopted by the Eighth Circuit *en banc* in *Ryther v. Kare 11*, 108 F.3d 832, 837-38, 848 (8th Cir. 1997) (*en banc*).

As held in *Rothmeier*, adopted by *Ryther*, and quoted in *Kneibert*,

---

[1] Summary judgment was also granted and affirmed on Petitioner's Title VII and state law race discrimination claims, for the independent reason that they were "barred by a Settlement Agreement he signed." Petitioner raises in his petition no challenge to the grant of summary judgment for this reason, leaving only his ADEA claim at issue here.

> the rule in this Circuit is that an age discrimination plaintiff can avoid summary judgment only if the evidence considered in its entirety (1) creates a fact issue as to whether the employer's proffered reasons are pretextual and (2) creates a reasonable inference that age was a determinative factor in the adverse employment decision. The second part of this test sometimes may be satisfied without additional evidence where the overall strength of the *prima facie* case and the evidence of pretext "suffice[s] to show intentional discrimination." The focus, however, always remains on the ultimate question of law: whether the evidence is sufficient to create a genuine issue of fact as to whether the employer intentionally discriminated against the plaintiff because of the plaintiff's age.

Rothmeier, 85 F.3d 1328, 1336-37.

The *Kneibert* decision further examined *Ryther*'s discussion of the *Rothmeier* rule, noting that *Ryther* more fully explained:

> In sum, when the employer produces a nondiscriminatory reason for its actions, the *prima facie* case no longer creates a legal presumption of unlawful discrimination. The elements of the *prima facie* case remain, however, and if they are accompanied by evidence of pretext and disbelief of the defendant's proffered explanation, they may permit the jury to find for the plaintiff. This is not to say that, for the plaintiff to succeed, simply proving pretext is necessarily enough. We emphasize that evidence of pretext will not by itself be enough to make a submissible case if it is, standing alone, inconsistent

> with a reasonable inference of age discrimination.

Kneibert, 129 F.3d at 454, n.6 (quoting *Ryther*, 108 F.3d at 837). From the *Rothmeier* and *Ryther* principles, *Kneibert* concluded that the plaintiff "must set forth sufficient evidence of pretext so that a trier of fact could reasonably infer that age discrimination motivated the adverse employment action." *Id.*

The Eighth Circuit's holdings in *Kneibert*, *Ryther*, and *Rothmeier* are entirely consistent with this Court's decision in *Reeves v. Sanderson Plumbing Products*. In *Reeves*, the Fifth Circuit Court of Appeals had proceeded from "the premise that a plaintiff must *always* introduce additional, independent evidence of discrimination," *in addition to* the evidence supporting the plaintiff's *prima facie* case and evidence of pretext, in order to permit a finding of liability. *Reeves*, 120 S. Ct. at 2109 (emphasis added). This Court found the Fifth Circuit's standard to be erroneous. *Id.*

Rather, the Court held that

> a plaintiff's *prima facie* case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated.
>
> This is not to say that such a showing by the plaintiff will always be adequate to sustain a jury's finding of liability. Certainly there will be instances where, although the plaintiff has established a *prima facie* case and set forth sufficient evidence to reject the defendant's explanation, no rational fact finder could conclude that

> the action was discriminatory. For instance an employer would be entitled to judgment as a matter of law if the record conclusively revealed some other, nondiscriminatory reason for the employer's decision, or if the plaintiff created only a weak issue of fact as to whether the employer's reason was untrue and there was abundant and uncontroverted independent evidence that no discrimination had occurred.

Id. (citations omitted).

Further, the Court stated that "the ultimate question in every employment discrimination case involving a claim of disparate treatment is whether the plaintiff was the victim of intentional discrimination." *Id.* at 2111. "Whether judgment as a matter of law is appropriate in any particular case will depend on a number of factors. Those include the strength of the plaintiff's *prima facie* case, the probative value of the proof that the employer's explanation is false, and any other evidence that supports the employer's case and that properly may be considered on a motion for judgment as a matter of law." *Id.* at 2109.

Thus, the holding of *Reeves* that proof of a *prima facie* case and evidence of pretext may in some circumstances suffice to withstand an employer's motion for judgment as a matter of law is entirely consistent with the Eighth Circuit's holdings in *Rothmeier* and *Ryther* as adopted in *Kneibert* that "the elements of the *prima facie* case . . . and evidence of pretext . . . may permit the jury to find for the plaintiff." *Ryther*, 108 F.3d at 837. Likewise, the Court's conclusion in *Reeves* that mere evidence of pretext will not always be sufficient to sustain a jury's finding of liability, *Reeves*, 120 S. Ct. at 2109, is entirely consistent with the Eighth Circuit's prior holding "that evidence of

pretext will not by itself be enough to make a submissible case if it is, standing alone, inconsistent with a reasonable inference of age discrimination." *Ryther*, 108 F.3d at 837.

Because the decision of the Supreme Court in *Reeves v. Sanderson Plumbing Products* does not materially change the law of the Eighth Circuit, Petitioner's request for writ of *certiorari* should be denied.

II. THE STANDARD FOR ANALYZING PRETEXT EVIDENCE IS MOOT IN ANY EVENT, BECAUSE THERE WAS NO EVIDENCE OF PRETEXT.

Even assuming *Reeves* altered the standard for analyzing whether some evidence of pretext may be sufficient to survive a motion for summary judgment, the point is moot because the district court concluded and the Eighth Circuit affirmed that Petitioner's evidence failed to "demonstrate pretext" of any sort.

Pages six and seven of the district court's decision analyzed Petitioner's discrimination claim under the standards of *Kneibert* and prior Eighth Circuit holdings. *See Ward v. Heritage Media Corp.*, No. 98-0157-CV-W-3, at *7-*9 (W.D. Mo. Apr. 21, 1999). After noting that Petitioner's *prima facie* case was not in dispute for the purposes of Respondent's motion for summary judgment, the district court held that Respondent had offered legitimate nondiscriminatory reasons for its decision not to retain Petitioner on its sales staff. *See id.* The articulated reasons included a belief by three interviewers that Petitioner would be unwilling to abide by rules and policies, a concern based on a newspaper article and Petitioner's statements in interviews that he would not stay at the station if the format changed from classical music, and a

concern that Petitioner lacked experience with computerized techniques and lacked interest in learning them. *See id.*

The district court analyzed Petitioner's arguments regarding each of these legitimate nondiscriminatory reasons, and explained why Petitioner's arguments failed to suggest that Respondent's stated reasons were untrue or pretextual in any way. *See id.* In addition, the court held that "even if Plaintiff has demonstrated the defendant's proffered explanations are somehow false, his legal claims must fail because he has not demonstrated that the explanations were a pretext for discrimination." *Id.* (citing *Rothmeier*, 85 F.3d at 1332-38; *Ryther*, 108 F.3d at 837-38 & n.4). The analysis of the district court was affirmed by the Eighth Circuit in its *per curiam* decision stating that all of Petitioner's claims "suffer from the same deficiency – lack of a jury issue as to pretext."

Because the district court concluded and the Eighth Circuit affirmed that Petitioner's evidence did nothing to cast doubt on Respondent's legitimate, nondiscriminatory reasons for not selecting him, Petitioner's arguments regarding the implications of *Reeves* are merely academic. *Reeves* addressed a situation in which a plaintiff had proffered *some* evidence suggesting that a defendant's stated reasons for its actions were pretextual. Here, Petitioner's evidence does not even rise to that level, as both courts below concluded there was *no* evidence of pretext.

As any impact of the *Reeves* decision on the law of the Eighth Circuit is irrelevant as applied here, Petitioner's request for writ of *certiorari* should be denied.

CONCLUSION

It is clear that the evidentiary standard applied below is entirely consistent with this Court's decision in *Reeves* and that, in any event, Petitioner could fare no better under *Reeves* because he failed to demonstrate any evidence of pretext. In light of the foregoing, the Court has no basis for, and should have no interest in, granting Petitioner's request for writ of *certiorari* in this case.

Respectfully submitted,

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APPENDIX

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July 12, 2000 Order of the United States Court of Appeals for the Eighth Circuit denying Petitioner's motion for recall of mandate A-1

29 U.S.C. § 623(a)(1) A-2

29 U.S.C. § 626(c) A-3

UNITED STATES COURT OF APPEALS

No. 99-2540WMKC

Lawyer Ward, Appellant, vs. Heritage Media Corporation, an Iowa Corporation, doing business as KXTR FM, Appellee.	*	Appeal from the United States District Court for the Western District of Missouri

Appellant's motion to recall the mandate has been considered by the court and is denied.

(5120-010199)

July 12, 2000

Order Entered at the Direction of the Court:

/s/ Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit

29 U.S.C. § 623(a)(1). Prohibition of Age Discrimination.

It shall be unlawful for an employer to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age.

29 U.S.C. § 626(c). Recordkeeping, Investigation, and Enforcement.

(1) Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter: Provided, That the right of any person to bring such action shall terminate upon the commencement of an action by the Equal Employment Opportunity Commission to enforce the right of such employee under this chapter.

(2) In an action brought under paragraph (1), a person shall be entitled to a trial by jury of any issue of fact in any such action for recovery of amounts owing as a result of a violation of this chapter, regardless of whether equitable relief is sought by any party in such action.